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No. 89-1279

IN THE
Supreme Court Of The United States

October Term, 1989

PACIFIC MUTUAL LIFE
INSURANCE COMPANY,

Petitioner

vs.

CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN AND EDDIE HALGROVE,

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

**BRIEF FOR AMICUS CURIAE
ALABAMA TRIAL LAWYERS ASSOCIATION
IN SUPPORT OF RESPONDENTS**

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IN SUPPORT OF RESPONDENTS**

INTEREST OF AMICUS CURIAE

The Alabama Trial Lawyers Association is composed of about 2000 lawyers who are dedicated to the ideals of preserving the adversarial system of justice and defending the rights of individuals. The Association believes in preserving the system of jury verdicts imposing punitive damages in appropriate cases as a socially desirable method of punishing wrongdoers and deterring others from engaging in similar wrongful conduct. The undersigned counsel of record is the Treasurer of the Association and the chair of its Amicus Curiae Committee.

SUMMARY OF ARGUMENT

Even if federal due process requires certain standards and procedures for the imposition of punitive damages in civil cases, the Alabama courts already meet or exceed any minimum due process standards. Caselaw and statutes enacted since 1986 require Alabama courts — trial and appellate — to stringently review verdicts alleged to be excessive. Therefore, the Petitioner in this case suffered no due process deprivation.

ARGUMENT

Judicial Review of Punitive Damage Verdicts in the State Courts of Alabama Provide Sufficient Due Process Safeguards

Virginia's Professor Kenneth R. Redden traces punitive damages — in civil cases — back to the English cases of *Wilkes v. Wood*, 2 Wils. K. B. 205, 95 Eng. Rep. 768 (C. P. 1763), and *Huckle v. Mone*, 2 Wils. K. B. 205, 95 Eng. Rep. 768 (C. P. 1763), and the first reported American case, *Coryell v. Colbaugh*, 1 N.J. (Coxe) 77 (1791). K. Redden, *Punitive Damages* 26, 32 (1980). The State of Alabama has sanctioned the use of punitive damages — then labeled “smart money” — since the case of *Rhodes v. Roberts*, 1 Stew. 145 (Ala. 1827). Traditionally, in Alabama, appellate opinions have repeated the principle that the amount of punitive damages was within the discretion of the jury. *Green Oil Co. v. Hornsby*, 539 So.2d 218, 222 (Ala. 1989). More recently, courts have begun to focus on the issue of “standards” governing the amount of punitive damage verdicts. Alabama's Justice Jones worried about “unguided discretion” and “no yardstick for measuring the amount of the award” in his special concurrence in *Ridout's-Brown Service, Inc. v. Holloway*, 397 So.2d 125, 127 (Ala. 1981).

In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 828-29 (1986), this Court remarked on the question of the “lack of sufficient standards governing punitive damage

awards in Alabama.” Similar comments appear in *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988), and *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, ___ U.S. ___, 109 S.Ct. 2909 (1989). Alabama courts have traditionally used language stating that new trial or remittitur would be proper only upon a showing that the verdict was the result of “bias, passion, prejudice, corruption, or other improper motive.” See, Comment, *Remittitur Practice in Alabama*, 34 Ala. L. Rev. 275, 278 (1983). The Law Review Comment cites scores of Alabama cases and argues the thesis that Alabama's remittitur practice lacked consistency. That thesis was cited, and virtually admitted, in *General Motors Corp. v. Edwards*, 482 So.2d 1176, 1199-1200 (Ala. 1985).

However, whatever the defects may have been in Alabama's former punitive damages procedures, they are no longer existant. Almost immediately after this Court's decision in *Lavoie*, the Alabama Supreme Court began to fashion due process safeguards with the release of *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986). Through the so-called “*Hammond* order” or “*Hammond* remand” procedures, the Alabama Supreme Court has now put into place sufficient objective standards by which both trial and appellate courts review claims of excessive punitive damages verdicts.

Under *Hammond*, Alabama trial judges must “state for the record the factors considered in either granting or denying a motion for new trial based upon the alleged excessiveness or inadequacy of a jury verdict.” 493 So.2d at 1379. Post-trial evidentiary hearings are allowed for this purpose. The original *Hammond* opinion suggested some relevant factors, such as: the culpability of defendant's conduct; the desirability of deterring others from similar conduct; and the impact upon the parties and others. *Id.*

A June, 1990, “Shepard's” search revealed 72 Alabama Supreme Court opinions citing *Hammond*. Of that number, 15 involve only compensatory damages. Another 12 are wrongful death cases. Alabama's unique wrongful death law provides solely damages denominated “puni-

tive." One Justice's view of the tortured history of Alabama's wrongful death statute is provided at *Tatum v. Schering Corp.*, 523 So.2d 1042, 1047 (Ala. 1988) (Houston, J., dissenting). This Court recently denied a petition for writ of certiorari (*Clardy v. Sanders*, 89-440, cert. denied on Nov. 6, 1989, 110 S.Ct. 376) attacking Alabama's wrongful death scheme on due process grounds. See generally, Nettles and Latta, *Alabama's Wrongful Death Statute: A Problematic Existence*, 40 Ala. L. Rev. 475 (1989). Furthermore, the "United States Supreme Court recognized the nonpenal effect of the [Alabama wrongful death] statute in its 1927 opinion" *Industrial Chemical & Fiberglass Corp. v. Chandler*, 547 So.2d 812, 818 (Ala. 1989) (citing *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927)).

The other 45 of the 72 "*Hammond*" cases involve some element of punitive damages, excluding wrongful death cases. Thirty-three are exclusively or partially fraud cases, such as *Pacific Mut. Life Ins. Co. v. Haslip*, 553 So.2d 537 (Ala. 1989). The remainder involve conversion (5), bad faith (3), assault, trespass, defamation, and wantonness.

The most important post-*Hammond* case — particularly for the question of due process standards — is *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala. 1989). The following "nonexclusive" list of factors are to be considered by the trial court in its post-trial review of punitive damages verdict amount:

"[1] Punitive damages should bear a reasonable relation to the harm that is likely to occur from the defendant's conduct as well as the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.

"[2] The degree of reprehensibility of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his con-

duct has caused or is likely to cause, and any concealment or cover-up of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of responsibility.

"[3] If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of this profit, so that the defendant recognizes a loss.

"[4] The financial position of the defendant would be relevant.

"[5] All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.

"[6] If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award.

"[7] If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award."

Green Oil Co. v. Hornsby, 539 So.2d at 223-224 (quoting *Aetna Life Insurance Co. v. Lavoie*, 505 So.2d 1050, 1062 (Ala. 1987) (Houston, J., concurring specially)).

Other factors mandated by the Alabama Supreme Court include "a comparative analysis with other awards in similar cases," *Aetna Life Ins. Co. v. Lavoie*, 505 So.2d 1050, 1053 (Ala. 1987); that "the defendant's right to fair punishment must be considered above the plaintiff's right to recover the fullest amount of punitive damages," *Wilson v. Dukona Corp., N.V.*, 547 So.2d 70, 73 (Ala. 1989); and that the punitive damages "ought to sting in order to deter," but normally should not "destroy," *Ridout's-Brown Service, Inc. v. Holloway*, 397 So.2d 125, 127 (Ala. 1981) (Jones, J., concurring), and *Central Alabama Elec. Co-op v. Tapley*, 546 So.2d 371, 377 (Ala. 1989). See Carr, *Punitive Damages and Post-Verdict Procedures: Where Are We Now and*

Where Do We Go From Here?, 51 Ala. Law. 90 (1990). Furthermore, one of Alabama's 1987 "tort reform" statutes, Ala. Code § 6-11-23 (1975) (Supp. 1989), mandates a de novo review of the nature, extent and economic impact of the verdict on the parties; the amount of compensatory damages; whether the defendant has committed similar wrongful acts; and the effort made by defendant to remedy the wrong. Also, Ala. Code § 6-11-20 (1975) (Supp. 1989) requires proof by "clear and convincing evidence."

"Due to the safeguards now in place in Alabama," the Alabama Supreme Court has rejected due process attacks on Alabama's system of awarding punitive damages. *Central Alabama Elec. Co-op v. Tapley*, 546 So.2d 371, 378 (1989). In explanation, the *Tapley* Court, 546 So.2d at 376-77, stated:

If a defendant is dissatisfied with a jury's verdict, and feels that it is excessive, or otherwise flawed, he is entitled to the protection of a variety of safeguards. The defendant may move for remittitur and a new trial in the trial court, and may appeal as a matter of right from the denial of either. He is entitled to a *de novo* review of the jury's verdict on appeal. The appellate courts in this state have the authority to order a new trial due to the excessiveness of the verdict, to conditionally order a new trial unless the plaintiff accepts a remittitur, and to order the trial court to conditionally order a new trial unless the plaintiff accepts a remittitur.

If a defendant properly moves the trial court to do so, the trial court is obligated to state on the record its reasons for either interfering with the jury's verdict or not interfering with it. And, in making the determination of whether the verdict is excessive (or inadequate), a trial court is authorized to consider the following non-exclusive list of factors: [the "*Green Oil*" factors].

The *Industrial Chemical* opinion, 47 So.2d at 839, rejected due process challenges and stated that, "In sum, 'fundamental fairness' requires that the defendant be given the opportunity to present proof to the trial court during post-judgment review of the verdict that the punitive award is unreasonably disproportionate, or economically destructive"

The Petitioner in this case had all the due process benefits of these standards and procedures. "In reviewing the punitive damages award in this case, the trial judge applied the principles of law adopted in these cases [*Hammond*, etc.], held a hearing, and set out on the record the reasons why he felt the law did not authorize him to order a remittitur. The facts in the record support the trial court's findings." *Pacific Mut. Life Ins. Co. v. Haslip*, 553 So.2d 537, 543 (Ala. 1989). There has been no due process violation in this case.

The Alabama courts do conscientiously and honestly apply these factors "with teeth." A case released the same day as *Hammond* demonstrates this assertion perfectly. In *Harmon v. Motors Ins. Corp.*, 493 So.2d 1370 (Ala. 1986), the jury awarded \$500,000 for fraud. The trial court remitted \$460,000 of the verdict, and, after a "*Hammond* remand," the Alabama Supreme Court affirmed the remittitur. *Harmon v. Motors Ins. Corp.*, 525 So.2d 411 (Ala. 1987). In *Williams v. Ralph Collins Ford-Chrysler, Inc.*, 551 So.2d 964 (Ala. 1989), a verdict for \$25,000, based on fraud and other claims, was remitted to \$10,000 by the trial court. The appellate court affirmed, referring to the "*Hammond* order" that found that the claimant's crying on the witness stand resulted in too much sympathy by the jury. In *State Farm Mut. Auto. Ins. Co. v. Robbins*, 541 So.2d 477 (Ala. 1989), a \$5,000,000 fraud verdict was remitted to \$500,000 and affirmed. *Hardy v. Hardy*, 507 So.2d 404 (Ala. 1986), a stockholder derivative suit for conversion or waste of corporate property, affirmed a remittitur from \$140,000 to \$100,000. *Green Oil Co. v. Hornsby*,

539 So.2d 218 (Ala. 1989), a fraud and breach of contract case, affirmed the remittitur of all but \$25,000 of a \$150,000 punitive damages verdict. Lastly, and most recently, the Alabama Supreme Court affirmed a fraud remittitur from \$2,500,000 down to \$600,000 in *Land & Associates, Inc. v. Simmons*, Nos. 87-1313, 87-1320, 87-1331, and 87-1339, slip op. (Ala. Dec. 22, 1989).

Ala. Code § 12-22-71 (1975) grants to appellate courts in Alabama the authority to order remittitur at the appellate level. The Alabama Supreme Court has used this authority often in order to control excessive verdicts. For example, even in face of the trial court's "Hammond order" refusing to remit, *North Carolina Mut. Life Ins. Co. v. Holley*, 533 So.2d 497, 507 (Ala. 1989), ordered a fraud verdict reduced from \$1,000,000 to \$500,000. In *United States Auto. Ass'n v. Wade*, 544 So.2d 906 (Ala. 1989), the \$3,500,000 punitive non-jury judgment for bad faith was remitted to \$2,500,000. In *Aetna Life Ins. Co. v. Lavoie*, 505 So.2d 1050 (Ala. 1987), a \$3,500,000 bad faith verdict was remitted by the Alabama Supreme Court to \$500,000. And, in *Wilson v. Dukona Corp., N.V.*, 547 So.2d 70, 74 (Ala. 1989), all of the punitive damages portion of the verdict was remitted by the Supreme Court because the relative poverty of the defendants indicated that punitive damages "would do nothing to further society's goals of punishment and deterrence."

CONCLUSION

The cases cited herein demonstrate that — even if this Court rules that federal due process requires certain objective standards and procedures in civil cases seeking punitive damages — Alabama already has in effect in its courts adequate due process safeguards, and that this Petitioner did not suffer a denial of due process.

Respectfully submitted,

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